MOTION FILED
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No. 89-465

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RUFUS E. CUNNINGHAM, *Petitioner*,

vs.

COUNTY OF LOS ANGELES, et al., *Respondents*,

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY POLICE MISCONDUCT LAWYERS REFERRAL SERVICE AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Police Misconduct Lawyers Referral Service (PMLRS), respectfully moves the Court for leave to file the following brief *amicus curiae* in support of the petition for a writ of certiorari filed by Rufus E. Cunningham. The consent of counsel for petitioner has been obtained, but counsel for respondents refuses to consent to the filing of this brief.

INTEREST OF *AMICUS CURIAE*

PMLRS is certified by the State Bar of California and has operated as a non-profit agency since 1982 under the auspices of Community Services Unlimited, Inc. Headquartered in Los Angeles, PMLRS provides consultation and assistance to victims of police misconduct throughout Southern California and, when appropriate, it refers victims to private attorneys for representation in civil lawsuits alleging police misconduct.

The PMLRS panel consists of approximately 75 competent attorneys experienced in police misconduct litigation.[1] PMLRS holds regular workshops and seminars on various aspects of civil rights litigation to keep its panel attorneys abreast of recent developments in trial tactics and the law. In addition, PMLRS actively seeks to recruit new attorneys for its panel to expand its capacity for representing police abuse victims and to increase the choices available for its clients.

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[1]Both Mr. Cunningham's trial counsel, Richard Eiden, and his appellate counsel, Robert Mann, are active members of PMLRS.

PMLRS often refers relatively small civil rights cases to its panel attorneys. Police misconduct victims with serious injuries generally obtain counsel from the regular plaintiff's personal injury bar. Victims with less serious injuries have difficulty obtaining counsel at all. Without PMLRS, many of these victims would not otherwise obtain legal representation for their cases. Most are members of poor and minority communities, the segments of the population which bears the brunt of police abuse.

The interest of the *amicus* is to insure that attorneys who handle relatively small civil rights suits are not penalized for taking on such cases, but rather, that they too are reasonably and fairly compensated for their time and effort when they prevail.

Small cases are important because they are more prevalent. There are many more false arrests than wrongful killings. If the overwhelming majority of fourth amendment violations are not, for practical purposes, actionable, then the right to be free from unreasonable search and seizure is greatly diminished. Accordingly, following the Supreme Court's decision in *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975), Congress enacted the Attorneys' Fees Act of 1976, 42 U.S.C. § 1988, to encourage civil rights litigation by insuring that attorneys who successfully vindicate fundamental rights receive a reasonable fee based on the hours worked, the results obtained and the prevailing rates in the community.[2] To effect Congressional policy

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[2] "Costs are a crucial factor in all forms of legal proceedings. A legal right worth X (in money or otherwise) is not in fact a right if it costs 2X to exercise it." T. Sowell, *Knowledge & Decisions* 236 (1980).

without causing an undue proliferation of attorney's fees litigation, this Court, in decisions such as *Texas State Teachers Association v. Garland Independent School District*, 109 S. Ct. 1486 (1989), *Blanchard v. Bergeron*, 109 S. Ct. 939 (1989), *City of Riverside v. Rivera*, 477 U.S. 561 (1986), and *Hensley v. Eckerhart*, 461 U.S. 424 (1983), has established that (1) prevailing civil rights plaintiffs are entitled to fee awards absent some well defined "special circumstance," and (2) the sums awarded should compensate the attorneys at prevailing market rates for time reasonably expended litigating the claim.

NECESSITY FOR *AMICUS CURIAE* BRIEF

Contrary to the mandate of Congress and resulting Supreme Court precedent, the Ninth Circuit Court of Appeals' decision in *Cunningham v. County of Los Angeles (Eiden)*, 879 F.2d 481 (9th Cir. 1989) (second amended opinion), frowns on attorneys who bring civil rights violations in federal court that involve small damages coupled with a violation of a fundamental constitutional right. It does so by punishing plaintiff's successful trial counsel by depriving him of reasonable attorney's fees because four of the seven defendants, although properly named in the suit, were dismissed before plaintiff prevailed. *Id.* at 484-89. Even more egregious, the Ninth Circuit denied plaintiff attorney's fees for his successful appeal solely on the basis of some

unexplained "balance of the equities," labelling it a "special circumstance." *Id.* at 490-91.[3] PMLRS appeared as *amicus* in the Ninth Circuit proceedings and is familiar with the issues of this case.

The *Cunningham* decision not only conflicts with the decisions of this Court, it is an aberration within the Ninth Circuit as well. For example, in a recent decision, *Borunda v. Richmond*, No. 87-2364 (9th Cir. Sept. 12, 1989), the Ninth Circuit stated that "'The presumption in favor of an award of fees to prevailing plaintiffs in private attorney general lawsuits is, in fact, so strong that a denial of fees on the basis of "special circumstances" is extremely rare.'" (quoting 1 M. Derfner & A. Wolf, *Court Awarded Attorney Fees* para. 10.02[3], at 10-12 (1988)).

Conflicting authority and wide open formulations such as the "balance of equities" are invitations to capricious decisions and intensive litigation over the entitlement to and amount of fee awards. Prevailing plaintiffs should be entitled to certain and simple fee awards based on reasonable lodestar determinations. On

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[3]Trial counsel's supposed error of asserting colorable claims against parties who were subsequently dismissed from the case -- an act which in fact comports with the dictates of this Court as well as the custom and practice of civil rights lawyers in the greater Los Angeles area -- was apparently the basis of the Ninth Circuit's denial of fees on appeal. In its Order and Amended Opinion of March 3, 1989, the Ninth Circuit panel explicitly denied plaintiff's appellate counsel fees because of trial counsel's purported transgression. Petition for Certiorari at A-36 to A-37. The second amended opinion is strangely silent on the point, however. 879 F.2d at 490-91.

this basis PMLRS strongly urges the Court to issue the writ of certiorari and reverse *Cunningham*.

Dated: October 13, 1989

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SUMMARY OF ARGUMENT

The *Cunningham* decision affirmed the trial court's setting plaintiff's trial counsel fees far below the true lodestar amount, and then denied fees altogether to plaintiff's successful appellate counsel. It did so because plaintiff did not prevail against all the parties named in the initial complaint. Such an arbitrary reduction of fees in the trial court and a capricious denial of fees on appeal undermines the Congressional mandate implicit in 42 U.S.C. § 1988 by denying police misconduct lawyers at the trial and appellate levels reasonable fees *even where they prevail.*

Since Congress enacted § 1988, this Court has established through a series of decisions that plaintiffs in civil rights cases are ordinarily entitled to a reasonable fee when they prevail. The clear tendency of precedent in this area is to insure certainty and simplicity in the fee award procedure while protecting litigants from arbitrary and capricious fee determinations. The Ninth Circuit's decision in *Cunningham* departs from such authority and threatens to multiply the volume and complexity of attorneys' fee litigation by interjecting vague formulations about "the balance of equities" into attorneys' fee jurisprudence.

Cunningham conflicts with *Blanchard v. Bergeron*, 109 S. Ct. 939 (1989), and *Texas State Teachers Association v. Garland Independent School District*, 109 S. Ct. 1486 (1989). Certiorari should be granted and the decision of the Ninth Circuit reversed.

ARGUMENT

I. FACTS

Rufus Cunningham brought a civil rights action against seven defendants -- six police officers and their employer, the County of Los Angeles -- alleging that he was arrested without probable cause. After prevailing against three defendants, his trial counsel, Richard Eiden, sought attorney's fees and submitted a lodestar figure of approximately $28,000.

The District Court did not determine the hourly rates to be unreasonable or the number of hours claimed to exceed those actually spent. 879 F.2d at 484-85. Nevertheless, the District Court fixed the lodestar to $12,000, 3/7th of the amount sought. Then the District Court reduced the award to $7,500, and assessed plaintiff's counsel with Rule 11 sanctions of approximately $5,000, leaving a net fee award of $2,500. Each decision was based on the fact that four of the seven defendants named by plaintiff in his initial complaint were dismissed before trial. Plaintiff appealed.

In arguing against the loadstar amount set by the trial court, plaintiff contended that *Hensley v. Eckerhart*, 461 U.S. 424, 435 n.11 (1983), precluded such an arbitrary mathematical formula. The Ninth Circuit agreed; yet it upheld the district court's determination of the lodestar as three-sevenths of the number of hours expended times a reasonable hourly rate. *Id.* at 485-86.

The Ninth Circuit then reversed the district court's reduction of the fee beneath the lodestar and vacated the Rule 11 sanctions, thus establishing plaintiff as the

prevailing party on appeal. However, while recognizing that "fees are ordinarily available to compensate attorneys for successful litigation of their fee applications, including work on appeal," *id.* at 490, the panel declined to award any fees or costs on appeal, stating

> The balance of equities in this case strongly disfavor the award of attorneys' fees on appeal. Cunningham's request for attorneys' fees on appeal is denied.

Id. at 491.

II. THE NINTH CIRCUIT DECISION IN THIS CASE CONFLICTS WITH *BLANCHARD V. BERGERON.*

In *Blanchard v. Bergeron* 109 S. Ct. 939 (1989), Mr. Blanchard recovered a total of $10,000 for his civil rights claim and sought attorney fees and costs totaling more than $40,000. Rejecting a defense contention that the fee award should be governed by principles applicable to tort contingency fee contracts, this Court unanimously determined that § 1988 attorney fees could not be capped at a percentage of the damages.

> "[W]e reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms."

109 S.Ct. at 945 (quoting *City of Riverside v. Rivera*, 477

U.S. 561, 574 (1986)).

In the case at bar, the net fees and costs awarded Cunningham by the district court, $2,500, was fifty percent of the $5,000 damage settlement. In setting the fees and costs at this amount, the district court said "Justice Rehnquist thinks that a comparison between the total award obtained and the attorney's fees requested should also be relevant in determining an attorney's fee award." Petition for Certiorari at A-12. The district court also said "The Ninth Circuit approved, in *Greater Los Angeles Council on Deafness*, of a direct comparison between the award sought and that obtained as a factor in determining the attorney's fee award." Petition for Certiorari at A-12 to A-13.[4]

This Court in *Blanchard*, however, did not "accept[] the contention that fee awards in § 1983 damages cases should be modeled upon the contingent fee arrangements used in personal injury litigation." Indeed, "If a contingent fee agreement were to govern as a strict limitation on the award of attorney's fees, an undesirable emphasis might be placed on the importance of the recovery of damages in civil rights litigation." 109 S. Ct. at 945.

Here, both the district court and the Ninth Circuit have substituted number of defendants against whom plaintiff ultimately prevails for the amount of damages

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[4] Neither the Ninth Circuit nor the district court mentioned that plaintiff offered to accept significantly *less* money before trial than was awarded after trial--or that the defendants' highest pre-trial offer was $1,500, which was to include damages, costs (which were alone $1,447.80), and attorney's fees.

obtained in setting a fee award. The position is even less defensible than that rejected by the *Blanchard* court. Moreover, it threatens to place civil rights attorneys in an intolerable ethical conflict of interest.

Counsel actively representing plaintiffs in police misconduct cases soon learn that prudence and caution mandate naming defendants against whom ultimate success is not guaranteed along with those public officials more directly involved in the constitutional violation. In California, civil rights plaintiffs face a brief one-year statute of limitations for civil rights actions compounded by Fed. R. Civ. P. 4(j)'s requirement of service of process within 120 days. Failure to name a party who ultimately turns out to have been responsible may lead to the loss of an otherwise meritorious claim.

If *Cunningham* stands, police misconduct lawyers will be hoisted on the horns of a perpetual and unjust dilemma. Should they jeopardize their clients' cases and expose themselves to legal malpractice claims by naming only parties against whom they are relatively sure to prevail? Or should they risk losing the majority of their fees at trial and then all their fees on appeal (even where they prevail) by cautiously naming all defendants against whom they may assert a colorable claim?

This Court has already addressed the matter. In *City of Riverside v. Rivera*, 477 U.S. 561 (1986), the trial court dismissed plaintiffs' claims against twenty-seven of thirty-two defendants named in a police misconduct case. Nevertheless, an attorney's fee award of almost $250,000 was affirmed. The Court quoted with approval the trial court's comment to plaintiffs' counsel that "it would, in my opinion, have been wrong for you not to join all

those officers since you yourself did not know precisely who were the officers that were responsible." *Id.* at 570-71.

Measured by *City of Riverside*, plaintiff's claims here against the four dismissed defendants were not frivolous, they were prudent. Two of those defendants were involved in plaintiff's wrongful incarceration and the other two employed the offending deputies. After pretrial discovery and motions clarified the proper parties, plaintiff's claim for compensatory damages remained unchanged; he had the same injuries as before. Plaintiff obtained a settlement which compensated him for those injuries. Whether there were three or seven defendants in the case at that stage made no difference. Why, then, should that fact reduce the amount of fees awarded?

It would seem that the courts should encourage litigants to drop those claims which the litigant believes to be unnecessary to the ultimate relief obtained. *Cunningham* sends the opposite message. Should every litigant pursue every claim to the bitter end, even when, after reflection and discovery, it appears that the prosecution of the claim will result in an undue consumption of time? Of course not.

In sum, police misconduct lawyers must be able to look to existing Supreme Court and Ninth Circuit precedent for guidance. When they follow those strictures and they prevail, they should receive a reasonable fee. Here this simple principle has been abandoned.

III. THE NINTH CIRCUIT DECISION CONFLICTS WITH *TEXAS STATE TEACHERS ASSOCIATION V. GARLAND INDEPENDENT SCHOOL DISTRICT.*

In the within matter, the trial court reduced the lodestar to less than half the product of the number of hours expended times a reasonable hourly rate solely because plaintiff prevailed against three of the seven defendants initially sued, even though plaintiff ultimately recovered all the relief to which he was entitled -- money damages. The Ninth Circuit affirmed, stating that

> far from an arbitrary slashing of the lodestar amount by the percentage of defendants dismissed, the court analyzed the importance of each defendant to Cunningham's overall case. The court considered not just the number of defendants, but also the claims brought against each one. Each factor was analyzed not for some talismanic significance of its own, but for its ability to shed light on "'the significance of the overall relief obtained' to all the claims and remedies pursued in the litigation." *Greater Los Angeles Council on Deafness v. Community Television of Southern California*, 813 F.2d 217, 222 (9th Cir 1987) (citing *Hensley*, 461 U.S. at 435).

879 F.2d at 486. This "significance" standard is a variant of the "importance" test already rejected by the Court.

Addressing a highly analogous decision in *Texas State Teachers Association* this Court stated,

> By focusing on the *subjective importance of an issue to the litigants*, it asks a question which is almost impossible to answer. . . . This question, the answer to which appears to depend largely on the mental state of the parties, is wholly irrelevant to the purposes behind the fee shifting provisions, and promises to mire district courts entertaining fee applications in a inquiry which one commentator has described as "excruciating." See M. Schwartz & J. Kirklin, Section 1988 Litigation: Claims, Defenses, and Fees § 156.11, p. 348 (1986). Creating such an unstable threshold to fee eligibility is sure to provoke prolonged litigation, thus deterring settlement of fee disputes and ensuring that the fee application will spawn a second litigation of significant dimension.

109 S. Ct. at 1492-93 (emphasis added).

The facts of *Cunningham* illustrate the difficulties in applying the "importance" standard rejected by *Texas State Teachers Association*. The Ninth Circuit opinion upholds the district court's setting the lodestar at less than one-half the number of hours expended times a reasonable hourly rate because Mr. Cunningham did not prevail on "important" claims, and then appears to deny him appellate fees on the same ground. But not only is such a subjective approach improper, the district court viewed the dismissed claims as *un*important, indeed "frivolous." 879 F.2d at 490.[5]

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[5] The claims were clearly not frivolous, as the panel opinion recognized. 879 F.2d at 490. They were, however, somewhat (continued...)

The result reached by the district court and the panel might make sense -- at least in reference to setting the lodestar if not in connection with denying fees on appeal -- if Mr. Cunningham's trial counsel had spent substantial time pursuing the unsuccessful claims, thus justifying apportionment pursuant to *Hensley*. However, his counsel did not do so. This is clear from the Ninth Circuit's First Amended Opinion where it says that counsel "made no effort to prove his case against the dismissed defendants," Petition for Certiorari at A-37, and from the second amended decision, where the Ninth Circuit wrote that plaintiff "did not oppose" motions for summary judgment and tried the case only with the three defendants against whom he ultimately prevailed. 479 F.2d at 483. The point is driven home by the fact that the district court imposed sanctions (subsequently vacated on appeal) because it believed that "*no part* of the discovery investigation" involved the dismissed defendants. Petition for Certiorari at A-15 (emphasis added).

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[5](...continued)
unimportant. The principal defendant against whom plaintiff did not prevail was the County of Los Angeles because plaintiff did not attempt to prove a case of unconstitutional policy, practice or custom pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and its progeny. While proving up a *Monell* case in circumstances such as those presented here presents substantial problems of proof, the benefits to the plaintiff are minimal at best because the entity is immune from liability for punitive damages, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), and, as a matter of California law, must indemnify public officials for liability based on compensatory damages. Cal. Gov't Code § 815.2.

Ironically, the County of Los Angeles ultimately funded the plaintiff's settlement here!

Attorney's fee applications should not engender litigation over slippery issues such as the "importance" or "significance" of various claims to the overall relief obtained. When attorney time actually expended can be apportioned between prevailing and unsuccessful claims pursuant to *Hensley*, that should be done. Here, however, the courts below arbitrarily slashed a legitimate lodestar of $28,000 and then denied fees on appeal armed only with vague formulations of "significance" and "balance of equities." Decisions such as *Cunningham, if* allowed to stand, will inevitably multiply the amount and complexity of post-judgment attorney's fees litigation, as parties battle over the validity, meaning and application of precedent which diffuses the clear standards set by this Court.

Civil rights plaintiffs who prevail should be able to obtain an adequate fee award in the amount of hours reasonably spent times the market rate prevailing in the community without having to negotiate minefields of legal mumbo-jumbo. Punitively low lodestar amounts, such as that upheld by the Ninth Circuit here, as well as the capricious denial of fees on appeal, have a serious chilling effect on the plaintiffs police misconduct bar. In that Congress has meant for such litigation to be *encouraged* rather than *discouraged*, PMLRS strongly urges that the Ninth Circuit's decision in *Cunningham* not be allowed to stand.

CONCLUSION

For the foregoing reasons, PMLRS, as *amicus curiae*, respectfully urges that the Court grant the petition for certiorari and issue the writ to the Ninth Circuit Court of Appeals. Ultimately, this case should be remanded to the trial court to fix an appropriate lodestar based on the hours reasonably expended times a reasonable hourly fee. Finally, plaintiff should be awarded reasonable attorney's fees for the work of his appellate counsel.

Allowing the Ninth Circuit's decision in *Cunningham* to stand would increase the volume and complexity of attorneys' fee litigation, undermine the defense of civil liberties, and controvert the clear Congressional mandate embodied in 42 U.S.C. § 1988.

Dated: October 13, 1989

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